the writ, when, by the local law, the attorney is liable for costs, when the client becomes unable or avoids doing so: *Anon.*, 2 Gall. 101. An attorney is liable to pay the costs on sham pleas, although instructed so to plead: *Vincent* v. *Groome*, 1 Chit. 182.

ADDISON G. MCKEAN.

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## *Supreme Court of Ohio.*

### SCOTT *v.* PERLEE.

A citizen of one state may contract in another state for a loan of money to be used in the state of his residence, and agree to pay interest therefor, lawful by the laws of the latter state, although the rate exceeds that allowed by the laws of the state where the contract is made.

In such case the contract is not rendered usurious by the fact that the interest is in excess of the rate allowed in the state where the contract is made, if the parties, without intending to evade the usury laws of that state, contract with reference to the law of the state where the debtor resides.

It is not essential to the validity of such contract as to the interest, that the note should be made payable, in express terms, in the state where the maker resides. To ascertain whether the parties intended, in good faith, to contract with reference to the laws of such state, all the circumstances surrounding the transaction will be examined.

ERROR to the District Court of Hamilton county.

John Perlee sued the plaintiffs in error upon the promissory note of which the following is a copy:

"$1000. FAIRBURY, Ill., Jan. 1st 1871.

One year after date, we promise to pay to the order of John Perlee $1000, at ten per cent., from date.

ANDREW J. SCOTT,
HENDERSON W. SCOTT,
Security."

Due Jan. 1st 1872.

The interest was paid for five years at the stipulated rate; and $700 was paid on the principal.

The petition claimed a balance due of $300, with ten per cent. interest, from January 1st 1876, and interest at six per cent. on two instalments of interest past due.

The defence was that the contract was made in Ohio; that $235 of said interest was usurious by the laws of Ohio, and that the usury should be credited upon the principal. The plaintiff replied that the contract was made in Illinois and the stipulated rate was legal by the laws of that state. The evidence as to the place of the contract was as follows:

The defendant, Andrew J. Scott, testified as follows:

"I obtained the loan from the plaintiff through my brother, my security, residing in Ohio; he and Perlee lived in Ohio; I lived in Illinois; I sent the note to my brother, my security on it; my brother then signed the note here in Ohio, and handed it to the plaintiff; I made the payments of interest myself; I sent the interest to plaintiff in Ohio; I paid him twice by draft; the loan was procured by Henderson W. Scott in Ohio."

Upon cross-examination, witness said: "The payments were all made here to plaintiff; I moved here in January 1872; * * * the contract for the loan was not made in Illinois; I wrote to my brother here to procure the loan; the matter was not talked over in 1870, in Illinois, about the loan; Perlee and I are brothers-in-law; * * * I did not obligate my surety to sign this note when plaintiff was in Illinois, or arrange for him to become surety," which was all the testimony offered by the defendant.

Perlee, in his own behalf, testified: "I and my wife were in Illinois, in 1870, to see defendant, A. J. Scott; he was building and wanted money; I said I did not have any; I said I had bonds; he offered me ten per cent. interest, in summer of 1870; I said I had my money in bonds; I agreed to loan him the money at ten per cent.; Henderson W. Scott to go on note; I was willing to let him have it on the terms named; this took place at Fairbury, Illinois, while I was visiting A. J. Scott, in the summer of 1870, and this note was sent without any other or further conversation or arrangement between us; I got the note from Henderson W. Scott, in Ohio, and gave him the money to send to Andrew J. Scott; the interest was paid by A. J. Scott, when due, by draft on New York; credited $100 on interest, and $700 on the principal."

The case was tried without a jury, and the Court of Common Pleas gave judgment in favor of Perlee, which judgment was affirmed by the District Court, whereupon this writ of error was taken.

*Thomas Millikin* and *C. J. Smith*, for plaintiff in error.

*Alexander Buckingham* and *A. C. Jenkins*, for defendant in error.

The opinion of the court was delivered by

DOYLE, J.—The findings and judgment of the court where a

case is tried without the intervention of a jury, will not be disturbed by this court unless such findings and judgment are clearly against the weight of the evidence. In the present case the testimony, beyond what appears on the face of the note, consists solely of that given by the two parties, Scott and Perlee. Which of them was to be believed was a matter properly to be determined by the court trying the case, and if the judgment can fairly be sustained upon the testimony of either, it ought not to be reversed: *Landis* v. *Kelly*, 27 Ohio St. 571.

The court might well find from the testimony, if the plaintiff was believed, that in the summer of 1870, the plaintiff was in Fairbury, Illinois, where the defendant, Andrew J. Scott, resided; that the latter desiring money to carry on some building enterprises in which he was engaged, in Illinois, applied to the plaintiff, who was his brother-in-law and visiting him at the time, for a loan, agreeing to pay him therefor ten per cent. interest; that the plaintiff agreed to make the loan upon the terms named, upon the defendant's note with Henderson W. Scott, who lived in Ohio, as surety, and without any further arrangement Scott wrote the note at Fairbury, at which place he dated and signed it; that it was then sent to Ohio to the surety who signed it and delivered it to the payee, receiving the money in this state and forwarding it to the principal, and that the parties intended in good faith, to contract with reference to the law of Illinois, as to the rate of interest to be paid for the use of the money.

The question is presented for our consideration, whether such a contract, thus made, is usurious? That this contract was executed in Ohio may be conceded; although signed in Illinois by the principal debtor and there dated, it was delivered in Ohio and was not a completed contract until delivery.

The fact that the loan was negotiated in Illinois, in accordance with the written terms of the note, is not insignificant, however, in determining the intention of the parties to contract with reference to Illinois law: *Findley* v. *Hall*, 12 Ohio St. 612.

It is then the case of a citizen of Illinois, executing his note in Ohio, in pursuance of an arrangement previously made in Illinois, for money borrowed to be used in the latter state, with an agreement to pay interest according to her laws, not intending or attempting thereby to evade our usury laws, but in good faith. Is such a contract tainted with usury?

Since the cases of *Findley* v. *Hall*, 12 Ohio St. 610, and *Kilgore* v. *Dempsey*, 25 Id. 413, it is undoubtedly the law of this state, and indeed it is now well established almost universally that when a contract is entered into in one state to be performed in another, between citizens of each, and the rate of interest is different in the two, the parties may, in good faith, stipulate for the rate of either, and thus expressly determine with reference to the law of which place that part of the contract shall be decided. When such a contract, in express terms provides for a rate of interest lawful in one but unlawful in the other state, the parties will be presumed to contract with reference to the laws of the state where the stipulated rate is lawful, and such presumption will prevail until overcome by proof that the stipulation was a shift to impart validity to a contract for a rate of interest in fact usurious: *Fisher* v. *Otis*, 3 Chandler 83; *Butters* v. *Olds*, 11 Iowa 1; *Arnold* v. *Potter*, 22 Id. 198; *Newman* v. *Kershaw*, 10 Wis. 340; *Hosford* v. *Nichols*, 1 Paige Ch. 225; *Townsend* v. *Riley*, 46 N. H. 300; *Depau* v. *Humphreys*, 20 Martin (La.) 1; *Fanning* v. *Consequa*, 17 Johns. 511; *Pratt* v. *Adams*, 7 Paige 615; *Chapman* v. *Robertson*, 6 Id. 627; *Richards* v. *Globe Bank*, 12 Wis. 696.

If the parties to the note in question had expressly stipulated in the note, that it was payable in Illinois, the contract to pay ten per cent. interest would be perfectly valid, although the note was executed in Ohio. Is it rendered invalid by reason of the omission to make that express stipulation? It is not entirely settled, by the authorities, where this note, as a matter of interpretation, is payable, there being no place expressly stipulated, but the weight of authority and the sounder reason, I think, sustain the proposition, that when a note is dated and signed at the place of residence of the debtor, and contains stipulations, lawful under the laws of such place, but forbidden by the law of the residence of the creditor, or where the note was completed by delivery, and no other place of payment is named, it will be presumed that the parties intended the note to be payable at the former place, assuming of course that no attempted evasion of the usury law of the latter is proved. In other words, in the absence of any proof, the presumption of law is that the note in question is an Illinois contract, and is valid both as to principal and interest.

To overcome this presumption the actual facts may be shown. It is shown that the contract was delivered in Ohio, but taken in

connection with the other facts proved, that does not overcome the presumption that it is payable in Illinois, where the debtor resided when he dated and signed his contract and where alone it is legal according to all of its terms: 2 Parsons on Contracts 584 and cases cited; Daniels on Neg. Inst., sect. 90; *Arnold* v. *Potter*, 22 Iowa 198; *Tillotson* v. *Tillotson*, 34 Conn. 336; *Jewell* v. *Wright*, 30 N. Y. 264. Where such express stipulation would uphold the contract, if the same thing can fairly be inferred from what is stipulated, it will likewise be upheld. But, while I believe that this contract can be thus sustained, it is not necessary to place the decision upon that ground.

There is no reason why a citizen of Illinois, or any other state, may not come into Ohio and borrow money to be used in the state of his residence, and in good faith contract with reference to the laws of the latter state, independently of where his note is executed or where it is legally presumed to be payable. In such case the only question is one of good faith. Did he honestly contract with reference to the law of his allegiance—the law of the state where he lives?

In *Arnold* v. *Potter*, 22 Iowa 194, the note was made by a citizen of Iowa in Massachusetts, payable in New York, and the court instructed the jury that "if defendant went to Boston and urged the loan, and promised ten per cent. under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa, in good faith, then the defence fails, and plaintiff can recover. If the parties in good faith loaned and borrowed the money sued for, with the full understanding that the law of Iowa was to govern as to the interest, then the laws of New York and Massachusetts can have no influence, but the understanding of the parties must prevail." The Supreme Court, in affirming this charge, say: "The form of the transaction is nothing, the cardinal inquiry being, when the contract specifying the amount reserved is express, did the parties resort to it as a means of disguising the usury in violation of the laws of the state where the contract was made or to be executed, and in arriving at this intention all of the facts are to be taken into consideration."

It is true that in this case, like *Chapman* v. *Robertson*, *supra*, security was given by mortgage upon lands in the state of the debtor's residence, but the fact that security is given for a note does not alter the terms of the note. But such fact has significance in

determining what the intention of the parties was, as to the laws of which state their contract had reference, or by which it was to be construed: *Newman* v. *Kershaw*, 10 Wis. 341; *Fisher* v. *Otis*, 3 Chandler 83; *Hosford* v. *Nichols*, 1 Paige Ch. 225; 2 Kent's Com. (12 ed.) 460. It is a fact of no greater significance than is found in this case, where the borrower actually negotiated for the loan in the state of his residence, dated his note there and stipulated for interest allowed by her laws: see *Hosford* v. *Nichols*, *supra*, 1 Paige 225.

In a recent case, *Kellog* v. *Miller*, 13 Fed. Rep. 198, decided by McCrary, C. J., in the Circuit Court of Nebraska, he held, upon a state of facts very like those recited in this case, except that there was a mortgage security, that the contract was valid upon both grounds assumed in this opinion; first, because the contract was to be performed in Nebraska, and second, on the ground we are now considering. "A citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the laws of the latter state, although the legal rate of interest allowed is greater in such state than in the state where the contract is made, and in which it is to be performed." See also *Tilden* v. *Blair*, 21 Wall. 241, and the comments thereon of Folger, J., in *Dickinson* v. *Edwards*, 77 N. Y. 580, that the ruling consideration of that case was the intention of the parties, that the draft should be used in Illinois, as a contract of that state, although accepted and payable in New York: *Wayne County Savings Bank* v. *Low*, 6 Abbott's New Cases, 76, 95, affirmed in 81 N. Y. 569; 2 Kent's Com., 12 ed., bottom paging 622 to 625, and note; *Vliet* v. *Camp* 13 Wis. 208. Indeed these cases are but applications of the rule as given by Lord Mansfield: "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed:" *Robinson* v. *Bland* 2 Burr. 1078.

"The place of making the contract is not to be so exclusively regarded, but that when the contracting parties had reference to another place, that may be regarded. That is, the intention of the parties shall govern when it is made manifest:" *Fisher* v. *Otis*, *supra*. That the parties here entered into this contract in good faith with reference to the laws of Illinois, there can be no doubt. The law of Ohio never entered into the transaction so far as the

intention of the parties can be ascertained. There was no intention to make an illegal contract; and to hold it illegal, we must be able to say that the mere fact that Scott forwarded this note to his surety for his signature, and that it was signed and delivered by the surety in Ohio, and the money there paid (more than probably as a mere matter of convenience), has the effect of defeating the intention of the parties. It is difficult to perceive upon what principle we should so find.

We do not, in thus holding, encourage two citizens of Ohio, to attempt to contract here for money to be used here, and make their notes payable in another state; nor, in any way, relax the strictness of the rules which prevent any form of evasion of the law against usury; but we hold that it is not repugnant to such laws for a person to contract with reference to the law of his domicile, for money to be used there, when no such evasion is sought or intended.

Judgment affirmed.

## ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

COURT OF ERRORS AND APPEALS OF MARYLAND.[3]

SUPREME COURT OF MISSOURI.[4]

SUPREME COURT OF OHIO.[5]

ADMIRALTY. See *Shipping.*

*Damages for Collision—Appellate Jurisdiction.*—The libellant in a suit *in rem*, in admiralty, against a vessel, for damages growing out of a collision, claimed, in his libel, to recover $27,000 damages. After the attachment of the vessel in the District Court, a stipulation in the sum of $2100, as her appraised value, was given. The libel having been dismissed by the Circuit Court on appeal, the libellant appealed to the U. S. Supreme Court: *Held*, that the matter in dispute did not exceed the sum or value of $5000, exclusive of costs, as required by sect. 3 of the Act of February 16th 1875, and that the Supreme Court had no jurisdiction

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 107 Otto.

[2] From Hon. N. L. Freeman, Reporter; to appear in 105 Ill. Reports.

[3] From J. Shaff Stockett, Esq., Reporter; to appear in 59 Md. Reports.

[4] From T. K. Skinker, Esq., Reporter; to appear in 76 Mo. Reports.

[5] From E. L. De Witt, Esq., Reporter. The cases will probably appear in 38 or 39 Ohio St. Reports.